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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BIC CORPORATION,

Petitioner,

v.

SAMUEL L. BEAN III AND LEIGH ANN BEAN, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state supreme court may, consistent with due process, create and apply retroactively a procedural requirement, contrary to the state's settled law, that a party must object after the fact to a trial judge's *ex parte* jury instruction given without notice to the parties, or be bound by an inconsistent and adverse verdict resulting directly from the instruction.

PARTIES TO THE PROCEEDINGS

Petitioner BIC Corporation was appellant/cross-appellee below before the Supreme Court of Alabama and petitioner on its petition for rehearing in that court. Respondents Samuel L. Bean, III and Leigh Ann Bean, individually and as personal representatives of the estate of the deceased minor child, Kristi Bean, and Luke Bean, by and through his next friend, Samuel L. Bean, III, were appellees/cross-appellants below. There are no petitioners or respondents in addition to those named in the caption.

Petitioner notes that its parent is Societe BIC, S.A. BIC Corporation owns a minority interest in Kosaido BIC Company, Ltd. of Japan. Aside from that interest, BIC Corporation has no non-wholly owned subsidiaries.

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PETITION FOR CERTIORARI

BIC Corporation respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama as described herein.

OPINION BELOW

The opinion of the Supreme Court of Alabama (App. 1a) is not yet officially reported. It appears at 1995 Ala. LEXIS 363. The Supreme Court of Alabama's denial of BIC Corporation's application for rehearing (App. 14a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 1, 1995. On September 15, 1995, BIC Corporation filed a petition for rehearing. On November 3, 1995, the Supreme Court of Alabama denied this petition. App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT

Petitioner BIC Corporation ("BIC") was sued by respondents Samuel L. Bean, III and Leigh Ann Bean, individually and as representatives of one of their minor children and the estate of a deceased minor child, in the Circuit Court of Jefferson County, Alabama. The Beans' suit arose from a fire that destroyed their house and that allegedly was caused by one of their children playing with a butane lighter manufactured by BIC. That portion of the complaint relevant here sought damages for personal injury and wrongful death on the ground that the BIC lighter was defectively designed, by not incorporating sufficient child-resistant features, within the meaning of Alabama's version of strict

liability, the Alabama Extended Manufacturer's Liability Doctrine.[1]

The case proceeded to trial before a jury. During its deliberations, the jury communicated with the trial judge's law clerk and asked whether it could return a verdict in favor of the two Bean children and, at the same time, return a verdict against the parents, Samuel and Leigh Ann Bean. Although attorneys for the parties were present in the courthouse at the time, the trial judge did not call for the attorneys, but told his law clerk to inform the jury that the answer to the question was "Yes." App. 15a. The trial judge then called the attorneys for the parties into his chambers to advise them of what had transpired. As the trial judge subsequently stated in an affidavit, made part of the trial court record by BIC and both considered and cited by the Supreme Court of Alabama, "[t]here was no opportunity for the attorneys for either party to object to the Court's response to the jury's question before the response was delivered to the jury." App. 15a, App. 5a.[2]

Shortly thereafter, the jury indicated that it had reached a verdict. The jury found in favor of BIC and against both Samuel and Leigh Ann Bean individually. The jury found in favor of the Beans as representatives of their minor children, however, and awarded a total of $250,000 in damages against BIC. App. 3a.

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[1] Respondents' claims for property damage were, by stipulation of the parties, decided by the trial court. The trial court found in favor of the Beans in the amount of $70,000, but held that these damages must be set off against, and thus were "extinguished" by, a prior award of $80,000 that the Beans recovered from one of their mortgagees in a separate action. The Supreme Court of Alabama reversed the trial court's judgment on this issue, holding that BIC had no liability on the property damage claims. App. 3a-4a, 10a. The property damage claims play no part in this petition.

[2] The sequence of events also was memorialized in an affidavit from the trial judge's law clerk, which also was made part of the trial court record. App. 17a.

BIC moved for a directed verdict or, in the alternative, a mistrial on the ground that the jury's verdicts were inconsistent. App. 3a. Because only one issue was submitted to the jury, whether BIC was liable for having manufactured a defective lighter, the jury, by finding BIC liable to the Bean children but not to the parents, necessarily found that the same lighter was simultaneously both defective and not defective. The trial court denied BIC's motion without explanation and entered its judgment on the jury's verdict. *Id.* BIC's subsequent motion for judgment notwithstanding the verdict or new trial on the same ground was denied.

On appeal to the Supreme Court of Alabama from those portions of the judgment based on the jury's verdict in favor of the Bean children, BIC argued again that the inconsistency of the verdicts against the Bean parents, but in favor of the children, warranted a judgment in favor of BIC or, in the alternative, a new trial. App. 4a. The Supreme Court of Alabama agreed with BIC that the jury's verdicts were inherently inconsistent, but nonetheless declined to reverse the award in respondents' favor.

The court acknowledged that "[o]bviously, the inconsistency of which BIC complains arises out of the trial court's affirmative answer to the jury's question." App. 5a. The court further explained that "[w]ere it not for the events that transpired during the jury's deliberations, we would be compelled to agree with BIC" that the jury's legally irreconcilable findings require a new trial. App. 4a. Nevertheless, the court held against BIC, stating that "*neither* the Beans nor BIC objected to the trial court's answer to the jury before it was given, or, as the trial judge's affidavit suggest [sic], *before the jury emerged from the jury room* with its verdict." App. 5a. (emphasis in original). The court cited Ala. R. Civ. P. 51 as supporting the conclusion that BIC waived any objection to the trial court's instruction. The Supreme Court of Alabama then held that the trial court's admittedly erroneous instruction "became . . . the law of the case" and would not be reversed. App. 11a.

BIC filed a petition for rehearing on September 15, 1995. In its petition, BIC pointed out, *inter alia*, that the law of Alabama for a century has been that where a trial court gives a jury instruction in the absence of counsel, the instruction is prejudicial *per se* and the only remedy is a new trial. Under this settled law, it is irrelevant whether a party objects; the *ex parte* instruction is deemed conclusively prejudicial. Petition for Rehearing at 4-5. On November 3, 1995, the Supreme Court of Alabama denied BIC's petition without explanation. App. 14a.[3]

REASONS FOR GRANTING THE PETITION

This case presents a gross miscarriage of justice which rises to the level of a violation of due process demanding the attention of this Court. It is apparent from the face of the record that an erroneous, *ex parte* instruction by the trial judge led directly to the rendering of inconsistent verdicts, including an award of $250,000 against BIC. The Supreme Court of Alabama invented a novel procedural bar, BIC's failure to make a post-instruction

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[3] When a state supreme court creates a novel procedural requirement, a petition for rehearing timely puts that requirement before this Court. *See, e.g., Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367 (1932) (a federal claim first raised by petition for rehearing in a state supreme court is timely for purposes of Supreme Court review "where the grounds of the [state court's] decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right"); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930) (claim in state court petition for rehearing is timely if raised at the first opportunity, even though the petition was denied without opinion); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930) (same); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) (federal claim raised in papers addressed to Supreme Court itself was timely where combination of unexpected state supreme court ruling on rehearing and state rule prohibiting more than one attempt at rehearing meant that Supreme Court review was the first opportunity to raise the issue). BIC could not have raised constitutional defects in the Supreme Court of Alabama's ruling until that court issued its opinion.

objection to the *ex parte* instruction, to block review of the inconsistent verdicts on appeal.

As demonstrated below, the Supreme Court of Alabama's new requirement of an objection after an *ex parte* instruction is unjustifiable and deprives BIC of its right to procedural due process. The Alabama court's decision, which is symptomatic of a state court system with a track record of visiting adversity upon out-of-state corporate defendants, puts it in conflict with a firmly established history of cases in which this Court has held precisely this type of procedural obstacle to be manifestly inadequate to prevent review. When such decisions are allowed to stand, defendants who are dragged into state court are denied the protection of their constitutional rights.

I. THE DECISION BELOW TURNS ON THE SUPREME COURT OF ALABAMA'S CREATION OF A WHOLLY NOVEL AND UNSUPPORTED PROCEDURAL BAR WHICH, UNDER THIS COURT'S PRECEDENTS, IS INADEQUATE TO PREVENT REVIEW.

This Court has evidenced a regular willingness to pierce through state procedural grounds when they are manufactured by state courts to arbitrarily foreclose review of legitimate claims of error. For example, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), the Court explained that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." The Court declined to apply a state procedural rule, even though in retrospect it appeared to form part of a consistent pattern of procedures, because the NAACP could not be "deemed to have been apprised of its existence." In *James v. Kentucky*, 466 U.S. 341, 348 (1984), the Court held that only a "firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent review by this Court. A state procedural rule also is inadequate to prevent review if it is applied with "pointless severity," *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964), or is merely

"an arid ritual of meaningless form." *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

More specifically, this Court has rejected arbitrary state court requirements that objections must be raised at particular times. In *Ford v. Georgia*, 498 U.S. 411, 424 (1991), the Court held inadequate a requirement that equal protection claims under *Batson v. Kentucky*, 476 U.S. 79 (1986), must be raised before the jury is sworn. The requirement was arbitrary because, among other things, it was announced after petitioner's trial and applied to him retroactively. In *Douglas v. Alabama*, 380 U.S. 415 (1965), the Court held that review could not be foreclosed by petitioner's failure to make sufficient objection to the reading of a witness' confession at trial when petitioner had, in fact, objected three times. "No legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected[.]" *Id.* at 422. The state court's ruling, which would have required objections "after each and every question in this prolonged series," *id.* at 423, was thus arbitrary and "plainly inadequate." *See also Williams v. Georgia*, 349 U.S. 375, 388 (1955) (requirement that objections to jury panel be made when the panel is "put upon" the defendant held inadequate because state courts allowed such objections to be raised later and determined as a matter of discretion).

In this case, the Supreme Court of Alabama's requirement of after-the-fact objection to an *ex parte* instruction is arbitrary. The requirement both flies in the face of established precedents and fails to serve a legitimate state interest.

First, the Supreme Court of Alabama's decision ignored and contradicted a settled rule of Alabama law. The Alabama rule for a century has been that when a trial court gives an instruction to the jury in the absence of counsel, the instruction is considered *per se* prejudicial and the only remedy is a new trial. This rule goes as far back as *Feibelman v. Manchester Fire Assurance Co.*, 19 So. 540 (Ala. 1896), in which the Supreme Court of Alabama reasoned that a supplemental *ex parte* instruction by the trial judge was "a denial to the plaintiff of the constitutional right to

prosecute the cause by counsel," as guaranteed by the state constitution. *Id.* at 549. The court went on to hold that *ex parte* instructions are conclusively prejudicial:

> We can not inquire, in such a case, what instructions were given by the court to the jury, - whether they were correct or incorrect, prejudicial or otherwise. . . . The only safe course, therefore, when it is established that the court, with-out some overruling necessity therefor, gave instructions to the jury . . . in the absence of the complaining suitor's counsel . . . and without reasonable notice to them and opportunity to be present, is to withhold all inquiry and investigation into the correctness of the instructions or action of the court, and treat them as conclusively prejudicial, by reason of the suitor's deprivation of his constitutional right.

Id. at 549-550.

That *ex parte* instructions are conclusively prejudicial has been reaffirmed repeatedly. In *Matthews v. Liberty Mutual Ins. Co.*, 243 So.2d 703 (Ala. 1971), the court held that a trial judge's supplemental *ex parte* instructions amounted to a violation of the constitutional right to a fair trial:

> [W]hen it is established that the court, without some over-ruling necessity therefor, communicates with the jury in the jury room, in the absence of the parties and their counsel, and without reasonable notice to them and opportunity to be present, we should treat such communications as conclusive-ly prejudicial being a deprivation of the constitutional right to a fair trial to which every party litigant is entitled.

Id. at 710 (internal quotation marks omitted). The court further reasoned that *ex parte* instructions must be deemed prejudicial because they impair public confidence in the judicial system and mar the appearance of justice. *See id.* at 708. *Accord*, *Edwards v. Seaboard Coast Line R.R.*, 384 So.2d 96 (Ala. 1980) (trial judge committed reversible error by improperly communicating with and giving instructions to two members of the jury in

separate incidents and outside the presence of counsel).[4] The Supreme Court of Alabama did not purport to overrule this long-standing rule of constitutional significance, or even to distinguish its own precedents. It simply ignored them.

Second, the Supreme Court of Alabama's rationale for the requirement imposed on BIC is not responsive to the error that occurred. The purpose of the court's requirement of an objection after an *ex parte* instruction, presumably, is to give the trial judge an opportunity to correct the instruction if it is erroneous. As explained above, however, under settled Alabama precedent the violation of BIC's state constitutional rights was uncorrectable at the moment of the *ex parte* instruction. A subsequent instruction could not cure the fact that BIC's counsel was excluded from the process of considering the jury's question and responding to it. A subsequent instruction also cannot cure the damage done to public confidence and the appearance of justice by the *ex parte* contact. Nor does it matter, as Alabama law also makes clear, what the substance of the *ex parte* instruction was, or whether it could have been cured; the instruction was conclusively prejudicial regardless of its substance.

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[4] This Court has an equally impressive history of holding that *ex parte* instructions violate rules of orderly trial procedure which, in turn, have obvious due process underpinnings. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 459-62 (1978) (*ex parte* communications between trial judge and jury foreman that were "allowed to drift into what amounted to a supplemental instruction" constituted errors that would have justified reversal of antitrust convictions); *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919) ("the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties . . . to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict"; trial judge "erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction."). *Accord, Rogers v. United States*, 422 U.S. 35, 41 (1975); *Shields v. United States*, 273 U.S. 583, 588-89 (1927).

Third, the Supreme Court of Alabama's reliance on Ala. R. Civ. P. 51 is similarly non-responsive. Neither the rule nor the case cited in the court's opinion concern *ex parte* instructions, which are a matter of state constitutional significance. Rule 51 concerns only the substance of jury instructions, not error arising from the judge's improper *contact* with the jury.[5]

In any event, Rule 51 was inapplicable to this case, because it speaks only to instructions given before the jury begins deliberations. Thus, the rule states that the trial court shall rule on proposed instructions "prior to [the parties'] arguments to the jury." The rule also requires parties to object to instructions "before the jury retires to consider its verdict[.]" The *ex parte* instruction here was given near the *end* of deliberations. The Supreme Court of Alabama's focus on the sentence "[o]pportunity shall be given to make the objection out of the hearing of the jury," App. 7a, stripping this sentence from its context of instructions given before the jury begins deliberations, is not responsive to the harm that was done to BIC: even if BIC had requested a post-instruction opportunity to object, it still would have waived its right to appeal under the sentence of the rule that mandates waiver unless objection is made "before the jury retires to consider its verdict." By applying the rule to a context that it does not fit, the Supreme Court of Alabama unfairly whipsawed BIC between a requirement that it must object "before the jury

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[5] Ala. R. Civ. P. 51, which is based on Fed. R. Civ. P. 51, provides in pertinent part:

> The court shall inform counsel of its proposed action upon the requests [for jury instructions] prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. . . . No party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless that party objects thereto before the jury retires to consider its verdict, stating the matter objected to and the grounds of the objection. . . . Opportunity shall be given to make the objection out of the hearing of the jury.

retires to consider its verdict" and the fact that the trial judge denied BIC the opportunity to do so.

Fourth, the Supreme Court of Alabama denied BIC's petition for rehearing, which raised the preceding arguments, in the face of its own precedents holding that rehearing should be granted when a petition identifies errors of law in the court's opinion. For example, in *Sharp Electronics Corp. v. Shaw*, 524 So.2d 586, 587 (Ala. 1987), the court announced:

> The office of a rehearing is to call to the Court's attention any errors of fact, as well as of law, and to provide the Court with a final opportunity to see that justice is done. This Court should stand with an open mind throughout all stages of the appellate process, including the rehearing stage.

In *Ex parte Johnson*, 620 So.2d 665 (Ala. 1993), the court faced a rehearing issue analagous to this case. Johnson had been convicted of violating a state statute prohibiting persons convicted of committing "crime[s] of violence" from possessing a "pistol." At the close of the evidence, Johnson moved for a judgment of acquittal and objected to the state's evidence, but did not specifically object to a lack of proof on the element of a prior "crime of violence." The Supreme Court of Alabama's original opinion (1992 Ala. LEXIS 504 (Ala. May 15, 1992)) affirmed the conviction and agreed with the Court of Criminal Appeals that the objection was not sufficiently specific to preserve the issue of whether the state failed to prove a prima facie case. On rehearing, however, the court reversed the conviction and held, relying on several precedents not mentioned in the original opinion, that prior law made clear that a motion to exclude evidence is sufficient to preserve the issue. The Supreme Court of Alabama similarly has reversed itself on questions of law in many other cases.[6]

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[6] To cite only a few examples from the past four years, *see, e.g.*, *Ex parte State (Re: Peeples v. State)*, 1995 Ala. LEXIS 461 (Ala. Dec. 1, 1995) (holding on rehearing that trial court, in child sexual abuse prosecution, erred in excluding evidence that child prosecutrix had made

The Supreme Court of Alabama's utter disregard for its own precedent, and its reliance on rationales that are not responsive to the error that occurred, show that the new requirement of objection after an *ex parte* instruction is simply a pretense that serves no purpose. The court's procedural bar is no different from the requirements of making "exceptions" very specific (*Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)), which was held inadequate because not evenly applied; separating assignments of error in a brief instead of grouping them together (*NAACP v. Alabama ex rel. Flowers*, 377 U.S. at 297), which was held to have been applied with "pointless severity"; or attacking the constitutionality of sections of an ordinance by individual number instead of the ordinance as a whole (*Staub v. City of Baxley*, 355 U.S. at 320), which was held to be "an arid ritual of meaningless form."

II. THE SUPREME COURT OF ALABAMA'S CREATION OF AN ARBITRARY PROCEDURAL BAR VIOLATES DUE PROCESS.

When a state supreme court erects a novel procedural bar and applies it in a way that results in manifest injustice, this Court has found a violation of federal due process. For example, in *Reich v. Collins*, 115 S. Ct. 547 (1994), the Court held that a state may not hold out a post-deprivation remedy for unconstitutional taxes and then reconfigure its scheme in midcourse, by decision of the

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certain inconsistent statements; original opinion held the opposite); *Taylor v. Shoemaker*, 605 So.2d 828 (Ala. 1992) (holding on rehearing that state engineers and superintendent were immune from suit arising out of car collision with railway rails; original opinion held the opposite); *Zickler v. Shultz*, 603 So.2d 916 (Ala. 1992) (holding on rehearing that summary judgment in breach of contract action was error because there was substantial evidence of the parties' meeting of the minds, and bankruptcy court's plan of reorganization was not *res judicata* with respect to plaintiff's claims; original opinion held the opposite); *Michaud v. Morris*, 603 So.2d 886 (Ala. 1992) (on rehearing, reversing judgment in favor of minority shareholder in derivative action; original opinion summarily affirmed).

state supreme court, so as to bar taxpayers from making use of the remedy. The Court condemned the Supreme Court of Georgia's maneuver as unfair "bait and switch" and remanded for the provision of relief "consistent with due process." *Id.* at 550-551.

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), the Court held that the Supreme Court of Missouri violated due process by denying an injunction against the collection of unlawful taxes on the basis of the taxpayer's failure to pursue administrative remedies. The procedural bar was a sham because the state's prior law had made clear that no such administrative remedies existed. The Court did not reach the merits of the tax issue, which was a matter of state law, but focused "solely [on] the question whether the plaintiff has been accorded due process in the primary sense, - whether it has had an opportunity to present its case and be heard in its support." *Id.* at 681. The Court concluded that "while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law." *Id.* at 682.

And in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Court left no room to doubt that a state court-created procedural bar that is applied retroactively to deny a party a hearing on the merits is a due process violation. *Bouie* was a criminal case, and the Court held that the Supreme Court of South Carolina violated due process by announcing an unforeseeable construction of a criminal statute and applying that interpretation retroactively to subject the defendants to criminal liability for past conduct. The Court reached that conclusion by reasoning in part from *NAACP v. Alabama* and other cases cited above "holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." *Id.* at 354. The Court explained that "the basic due process concept involved" in a retroactive criminal law interpretation is precisely the same as in the creation of a novel procedural requirement:

> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'

Id. (quoting *Brinkerhoff*, 281 U.S. at 678). *See also Ford v. Georgia*, 498 U.S. at 424 (explaining that to apply retroactively a procedural requirement created by the Georgia Supreme Court "would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground").

This case exhibits the same hallmarks of a denial of due process. The Supreme Court of Alabama created a new requirement of objection following an *ex parte* instruction, notwithstanding Alabama's unambiguous rule that *ex parte* instructions are *per se* grounds for reversal, and effectively applied that requirement retroactively to BIC. As a direct result, the court sustained verdicts resulting in a substantial award against BIC, that it acknowledged to be erroneous and inconsistent.

This result is particularly alarming as part of a pattern in which the Alabama courts seem to bend the administration of justice for the purpose of inflicting massive damages on out-of-state corporate defendants. For example, it is widely recognized that punitive damage awards "have been soaring in Alabama at a dizzying rate."[7] The state legislature passed a tort reform

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[7] *The Litigation Reform Tide*, The Wall Street Journal, Jan. 15, 1996, at A12; *see also, e.g.*, David Frum, *Unreformed*, Forbes, Feb. 1, 1993, at 82 (Alabama may be "the worst place in America in which to be a civil defendant"; "Over the past five years Alabama juries have awarded more than half a billion dollars in punitive damages, despite a tort law meant to curb them."); Linda Himelstein, *Jackpots from Alabama Juries*, Business Week, Nov. 28, 1994, at 83 (high-profile punitive damages cases are "becoming the norm" in Alabama; "'I've been studying jury verdicts for many years, and I've never seen anything like this,' says George L. Priest, a professor at Yale University Law School.

package in 1987, but it was invalidated by the Supreme Court of Alabama. Under Alabama venue rules, out-of-state defendants may be sued in virtually any county, resulting in forum-shopping for rural counties that may have only one judge.[8] During the past several years, substantial question has been raised about the objectivity of the Alabama state judiciary, which is elected by a partisan process in which contributions by lawyers play a major role.[9]

'It's clear that something is out of control.'").

[8] *See, e.g.*, Ala. Code § 6-3-7 (1975) ("A foreign corporation may be sued in any county in which it does business by agent"); Debra Davis, *"Tortville, USA": Barbour County is a Lovely Place to Live, But its Claim to Fame is a National Reputation for Staggering Jury Awards*, The Montgomery Advertiser, Dec. 4, 1995, at 1A; Gregory Jaynes, *Where the Torts Blossom; While Washington Debates Rules About Litigation, Down in Alabama, the Lawsuits Grow Thick and Wild*, Time, Mar. 20, 1995, at 38 ("Barbour County [is] an ordinary little county that has become nationally recognized as tort hell."); *id.* at 38 ("For his part, Robertson, the only circuit judge in the county . . . [has seen 88] cases filed since 1993 [by his former law partner, prominent plaintiffs' lawyer Jere Beasley]"); Jacqueline Bueno, *In Poor Alabama County, People Sue to Get Ahead*, The Wall Street Journal, Nov. 8, 1995, at S1 ("The average punitive damage award by juries here has topped $1 million in each of the past three years. . . . As Barbour County's population has steadily fallen to just under 25,000, the 212 lawsuits filed in Clayton so far this year are nearly four times the number filed in 1990.").

[9] *See, e.g.*, *Nightline*, ABC News, Oct. 14, 1995 (report of anchor Forrest Sawyer that "Alabama is not only afflicted with troubles in its court system, it has a growing reputation as a state with some of the best elections money and power can buy."); Leslie Spencer, *America's Third Political Party?*, Forbes, Oct. 24, 1994, at 60 ("A startling 38% of the total [plaintiffs' lawyers' campaign contributions] for [Alabama and Texas] was given to sitting supreme court judges or candidates. Some of these contributions were made while the judges were hearing cases brought by their lawyer-benefactors."); David Frum, *Unreformed*, Forbes, Feb. 1, 1993, at 82 ("[Alabama judges'] campaigns are largely

For all of these reasons, review of the decision below is important to safeguard established principles of due process, send a message to a state supreme court that seems increasingly out of control, and prevent a gross miscarriage of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

February 1, 1996

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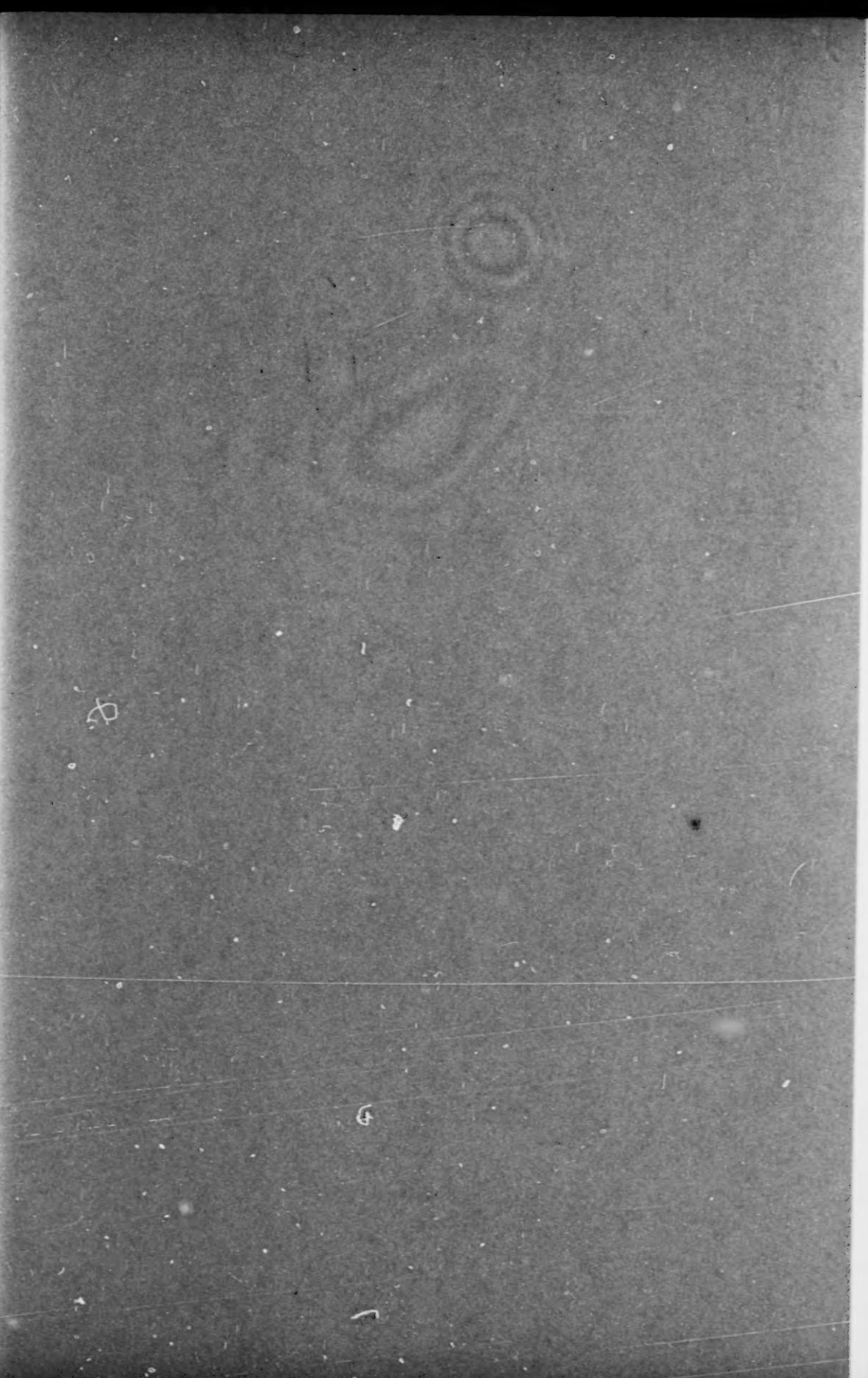
paid for by the lawyers who appear before them. Under Alabama law, leftover campaign funds can be spent on just about anything."); *id.* ("a 6-3 pro-plaintiff majority has dominated the [Alabama Supreme] court.").

APPENDICES



APPENDIX A

SUPREME COURT OF ALABAMA

BIC CORPORATION,

v.

SAMUEL L. BEAN III et al.

SAMUEL L. BEAN III and Leigh Ann Bean,

v.

BIC CORPORATION.

NOS. 1930751, 1930853.

Sept. 1, 1995.

Appeals from Jefferson Circuit Court (CV-89-3282).

COOK, Justice.

Pursuant to the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), the plaintiffs, Samuel L. Bean III, his wife Leigh Ann Bean, and their minor son Luke Bean, filed this wrongful death and products liability action against BIC Corporation ("BIC") and other defendants following a fire that destroyed the Beans' home on February 26, 1988. The fire, which resulted from the Bean children's playing with a butane cigarette lighter manufactured by BIC, injured five-year-old Luke Bean and killed four-year-old Kristi Bean.

Before commencing this action, the Beans began a collateral action against their mortgagees and State Farm Fire and Casualty Company, seeking damages for failure to provide or procure homeowner's insurance on their home. *Bean v. State Farm Fire & Cas. Co.*, 591 So.2d 17, 19 (Ala. 1991). Eventually, a jury returned a verdict in that case in favor of the Beans against one of the mortgagees for $80,000. *Id.* at 20.

In the meantime—on April 25, 1989—this AEMLD action was begun against BIC and others. The trial court granted BIC's motion for a partial summary judgment on the Beans' claims that BIC's lighter design was defective and that the BIC lighter failed to carry an appropriate warning.[1] On appeal, this Court held that the entry of the partial judgment was "premature." Specifically, as to the issue of alleged design defect, the Court stated:

> Proper and complete discovery would provide the trial court a greater opportunity to further assess this case toward the question of what duty, if any, BIC has to offer the public a child-resistant lighter. Adequate discovery could also provide answers to questions relating to the product's safety when measured against the foreseeability of a danger presented by its use as well as to the feasibility of an alternative design that could avert any danger.

Bean v. BIC Corp., 597 So.2d 1350, 1352-53 (Ala. 1992).

As to the claims that BIC had provided inadequate warnings regarding the use of the lighter, the Court held:

> We hold that BIC failed to show an absence of a genuine issue of material fact, because the affidavit [of BIC's expert] in support of the motion for summary judgment does not address the reasons the Beans argue that the warning was inadequate. The Beans do not contend that there was no warning, but rather that the warnings given did not adequately apprise them that small children would be attracted to the lighter and that it could be easily operated by small children. Because BIC has failed to show the absence of a genuine issue of material fact, as to the allegation of a failure to warn, the summary judgment is due to be reversed.

---

[1] For the purposes of the earlier appeal in this case, "BIC had stipulated, for purposes of determining whether a duty to child-proof [the lighter] existed, that 'it is feasible to design a more child-resistant lighter and also foreseeable that a child may come in contact with the lighter.'" *Bean v. BIC Corp.*, 597 So.2d 1350, 1351 (Ala. 1992).

597 So.2d at 1353-54.

During the trial following the remand from this Court, the parties agreed to allow the trial court to determine the issue of the Beans' alleged property damage and the amount of the award therefor, if any. The issue of BIC's liability under the AEMLD was to be determined by the jury.

During its deliberations, the jury asked the court whether it could find in favor of the minor children but against the parents. The judge answered this inquiry in the affirmative, and the jury returned the following verdicts:

> We, the jury, find the issues in favor of the defendant, BIC Corporation, and against the plaintiff, Sam L. Bean III.
>
> We, the jury, find the issues in favor of the defendant, BIC Corporation, and against the plaintiff, Leigh Ann Bean.
>
> We, the jury, find in favor of the plaintiff, Sam L. Bean III, as next friend of Luke Bean, a minor, and against the defendant, BIC Corporation, and assess plaintiff's damages at One Hundred Fifty Thousand Dollars ($150,000).
>
> We, the jury, find in favor of the plaintiffs, Sam L. Bean III and Leigh Ann Bean, as parents and personal representatives of the estate of Kristi Bean, and against the defendant, BIC Corporation, and assess plaintiffs' damages at One Hundred Thousand Dollars ($100,000).

BIC moved for a mistrial on the ground that the verdicts were inconsistent. The trial court denied BIC's motion and entered its judgment on the jury's verdicts on September 30, 1993.

On October 5, 1993, the Beans moved the trial court to enter a judgment on their claim for property damage. They sought "an award of $71,843.29," which, they alleged, represented the value "of jointly held real and personal property damaged or destroyed in the fire." On January 14, 1994, the trial court entered a judgment for the Beans in the amount of $70,000. The court, however, citing the Beans' collateral action in which they had

already received $80,000, see *Bean v. State Farm Fire & Cas. Co.*, 591 So.2d 17 (Ala. 1991), concluded that the $80,000 was due to "be credited against the amount of the [Beans'] recovery against ... BIC ... for damage to the [Beans'] real and personal property." Consequently, it held that the $70,000 judgment entered against BIC was "*extinguished* by a set-off through the entry and collection of the judgment" recovered in the earlier case. (Emphasis added.)

BIC appeals from those portions of the judgment that are based on the jury verdicts in favor of the injured minor plaintiff, Luke Bean, and in favor of the Beans, as parents of their deceased minor daughter, Kristi Bean. The Beans cross-appeal from that portion of the judgment that effectively awarded them no damages on their property damage claim.

Case No. 1930751—BIC's Appeal

BIC argues that the verdicts are inconsistent. More specifically, it contends:

> The jury's findings against Sam and Leigh Ann Bean but in favor of Luke and Kristi Bean are inherently inconsistent and contradictory. Only one liability issue was presented at trial: whether BIC was liable for having manufactured a lighter that was defective and unreasonably dangerous under the AEMLD. By finding that BIC *was* liable to the children but was *not* liable to the parents, the jury found that the same lighter was both defective and not defective. These legally irreconcilable findings require a new trial.

Reply Brief of Appellant/Cross-Appellee BIC Corporation, at 29 (emphasis in original).

Were it not for the events that transpired during the jury's deliberations, we would be compelled to agree with BIC. We derive the most accurate and complete account of those events from a post-trial affidavit given by the trial judge and submitted for the record by BIC. The judge's affidavit states in pertinent part:

2. I was the trial judge for the trial of *Samuel L. Bean, III, et al. v. BIC Corporation* (Civ. Action No. CV 89-3282), which was tried in the Circuit Court for Jefferson County, Alabama, beginning on September 13, 1993. The trial concluded with a jury verdict on September 30, 1993.

3. On September 30, 1993, my law clerk ... informed me that the jury had asked a question concerning whether the jury could award money to the children, Luke and Kristi Bean, but not to the parents, Sam and Leigh Ann Bean. At the time [she] informed me of the jury's question, there were no attorneys for any party present. *I instructed [her] to tell the jury "yes."*

4. After sending [the law clerk] back to the jury room to answer affirmatively the question posed by the jury, I called the attorneys for the Beans and BIC ... into my chambers to advise them of what had transpired. There was no opportunity for the attorneys for either party to object to the Court's response to the jury's question before the response was delivered to the jury.

(Emphasis added.)

Obviously, the inconsistency of which BIC complains arises out of the trial court's affirmative answer to the jury's question. It is undisputed, however, that *neither* the Beans nor BIC objected to the trial court's answer to the jury before it was given, or, as the trial judge's affidavit suggest, *before the jury emerged from the jury room* with its verdict. Criticizing, the *procedure* that was followed, BIC states:

The Beans ... argue that BIC waived its right to attack the consistency of the jury's verdict by failing to object to the 'charge' given by the trial court shortly before the verdict was returned.... As the Record on Appeal reflects, none of the attorneys were present when the trial court gave its affirmative response to the jury's question whether it could find in favor of the children but not in favor of the parents. As a result, none of the attorneys had an opportunity to object to the court's 'charge' *before it was given*.

Reply Brief of Appellant/Cross-Appellee BIC Corporation, at 32 (emphasis added) (citations and footnote omitted).

Ala. R. Civ. P. 51, however, does not require an opportunity to object before a charge *is given*. It merely requires that a party be permitted an "[o]pportunity ... to *make* the objection out of the hearing of the jury." (Emphasis added.) In *Kirkland & Co. of Anniston, P.C. v. A & M Food Serv., Inc.*, 579 So.2d 1278 (Ala. 1991), we explained this aspect of Rule 51, as follows:

> In *McLendon Pools, Inc. v. Bush*, 414 So.2d 92 (Ala.Civ.App. 1982), the Court of Civil Appeals stated:
>
> "As we read Rule 51, A.R.C.P., the onus for objection is upon counsel. The rule does not require the court to initiate the opportunity to object, only that opportunity be given to make the objection out of the hearing of the jury. We conclude that if counsel fails to request the opportunity to object, the court will not be in error for not affirmatively offering it."
>
> 414 So.2d at 95. In that case, it appeared that the oral charge was completed and that the jury was directed to retire. The trial court did not follow the usual procedure of asking counsel if they objected to the charge; however, the Court of Civil Appeals stated that the record did not reflect that counsel stated an objection or requested an opportunity to do so. The court held that the trial court did not err.
>
> We find the analysis in *McLendon* instructive. In this case, the trial court asked counsel for Kirkland for a reaction to the oral charge, and counsel replied, "Satisfied, Your Honor." Counsel for Kirkland did not, at that juncture, object to the charge or request an opportunity to do so outside the presence of the jury. Because Kirkland's counsel failed to request an opportunity to object, the trial court will not be held in error for failing to offer the opportunity.

579 So.2d at 1285.

Crucial to the disposition of this issue would have been evidence that BIC objected to the charge at its *earliest opportunity*, which, as the affidavit reveals, was *after* the judge had apprised counsel of his response to the jury, and *before* the jury emerged from its deliberations. This evidence, however, has not been presented. Indeed, the tenor of the jury's question should have alerted *all* parties to the potential for prejudice in the court's instruction. A party may not—as was apparently done in this case—await the jury's verdict before challenging an instruction that invites an inconsistency.

"Unchallenged jury instructions become the law of the case. *Louisville & Nashville R.R. v. Atkins*, 435 So.2d 1275 (Ala. 1983)." *Clark v. Black*, 630 So.2d 1012, 1017 (Ala. 1993). "The jury is bound to follow such instructions, even if they are erroneous. *Lee v. Gidley*, 252 Ala. 156, 40 So.2d 80 (1949) (erroneous instructions became the law of the case, and a judgment entered on the jury's verdict comporting with those instructions would not be reversed on appeal)." 630 So.2d at 1017.

Because no party objected in a timely manner, the court's instruction, and the verdict rendered in accordance therewith, became the law of this case. For these reasons, BIC's inconsistency-of-the-verdict argument will not serve as grounds for reversal of the judgment entered on the jury verdict. BIC's other claims of error are also without merit.

Case Number 1930853—The Beans' Cross Appeal

The Beans contend that the trial court erred in first finding BIC liable for the Beans' property damage and awarding them $70,000, and then off-setting against that award the amount of the Beans' judgment in the fraud action against their mortgagee. BIC argues that the trial court erred in entering a judgment on the property-damage claim, because, it contends, to do so violated the parties' pre-verdict agreement regarding the disposition of that claim.

The agreement was evidenced by the following colloquy:

[Counsel for the Beans]. In keeping with our conversation before the noon break, and under the impressions imposed by the court regarding allowing interrogation about the lawsuit against the mortgage companies, we agree that the court determine the entirety of the Beans' claims for personal and real property damage, that is, personal and real property damage as opposed to any other kind of physical and mental injury or the wrongful death claim or claim in behalf of Luke. And, of course, *you would be guided by ... the jury's verdict on liability if that ever became a question on what you are doing*.

[Counsel for BIC]. The only thing I am concerned about is the court's coercion. I want to make it clear it is your choice, no—

[Counsel for the Beans]. When I make a deal, I make a deal.

[Counsel for BIC]. Good enough. That is all I want to know.

....

[The court]. Okay.

[Counsel for the Beans]. So, I guess we can expect not to hear anything about the—

[The court]. I guess that is a fair statement.

[Counsel for the Beans]. All right.

[The court]. Okay. With that behind us, are we ready to move forward?

[Counsel for the Beans]. Yes, Your Honor.

(Emphasis added.)

All parties concede that the agreement expressly required the court, in disposing of the Beans' property-damage claims, to enter a judgment *consistent* with the jury's verdict on the wrongful death and personal injury claims. The Beans, however, contend that the entry of judgment in their favor was not inconsistent with the jury's verdict, because, they argue, the jury's verdict was

based on a finding that neither Mr. Bean nor Mrs. Bean had suffered any *injuries*. They insist that the verdict was *not* based on a finding that BIC was not *liable* to Mr. and Mrs. Bean. BIC, of course, draws the opposite conclusion from the jury's verdict. We agree with BIC's construction of the verdict.

Verdicts are to be construed so as to effectuate the true intent of the jury. *See Cory v. Greyhound Lines, Inc.*, 257 So.2d 36, 41 (Fla. 1971). The jury's intent may be derived from a construction of its verdict in the context of the case as a whole, including its procedural posture, the issues, evidence, pleadings, arguments, and jury instructions. *See Reynolds Bros. Lumber Co. v. W.S. Newell Constr. Co.*, 284 Ala. 352, 356-57, 224 So.2d 899, 902 (1969); *Jim Walter Homes, Inc. v. Holman*, 373 So.2d 869, 871 (Ala.Civ.App. 1979).

Both Sam and Leigh Ann Bean claimed compensatory damages for physical injuries they incurred while escaping, and attempting to rescue their two children from, the fire that erupted in the family home. They also sought compensatory damages for mental anguish incurred in connection with their escape and as a result of the loss of their youngest child. Sam Bean was hospitalized immediately after the fire; Dr. Stuart Padove, a physician specializing in "pulmonary disease," gave extensive, particularized testimony as to some physical injuries Mr. Bean had incurred in the fire. Also, Leigh Ann Bean's mother testified that Mrs. Bean's doctor prescribed tranquilizers for her "the day of the fire," and had continued to prescribe them until the time of the trial. Indeed, whether Sam and Leigh Ann Bean actually sustained physical or emotional injuries was an issue that was never seriously contested.

One issue that *did* play a prominent role in the trial, however, regarded the Beans' supervision of their children. That issue was relevant to at least two elements of the plaintiffs' *prima facie* case, namely, foreseeability and proximate cause. As to *foreseeability*, the court charged the jury:

> The fifth element that the plaintiff[s] must prove to your reasonable satisfaction is that the lighter was being used in an

> intended or reasonably foreseeable manner at the time of the fire. The plaintiffs claim that it was reasonably foreseeable, at the time BIC marketed the lighter in question, that children too young to appreciate the dangers of operating the lighter, could obtain and operate the lighter.
>
> ... Whether it was reasonably foreseeable that children too young to appreciate the dangers of operating BIC lighters, could obtain and operate such lighters is a fact issue for you to decide based on all the evidence presented.

Also, forcefully presented in closing argument was BIC's contention that the Beans had failed to supervise their children and that their failure in that regard was the sole *proximate cause* of the fire. See *Reply Brief of Appellant/Cross-Appellee BIC Corporation*, at 21.

Nothing in the manner in which this case was tried suggests that a *damages* question lay at the heart of the jury's query to the trial court. Indeed, to propose that two of four plaintiffs in a personal injury action could not recover—regardless of the extent of their own injuries—unless the other two plaintiffs could also prove some injuries, *defies common experience and reasoning*. Far more plausible is a construction of the verdict as evidence of the jury's reluctance, because of a finding of a lack of parental supervision, either to (1) hold BIC liable for the *parents'* injuries or (2) penalize the small children for what it considered the fault of the parents.

Moreover, the verdicts themselves expressly declared a finding of the "issues *in favor of the defendant*, BIC Corporation, and *against* the [adult plaintiffs]." (Emphasis added.) The jury had at its disposal verdict forms evidencing a finding in *favor of the adult plaintiffs* and assessing discretionary damages. Had the jury merely intended to express a finding that the parents had shown no injury, it would have used those verdict forms and would have awarded zero or nominal damages.

Construing the verdict in the context of the peculiarities of this case, we must conclude that the jury desired to express its view

that these plaintiffs, as adult parents, should bear personal responsibility for what the jurors must have seen as the parents' lack of proper parental supervision of their children. The trial court's affirmative response to the jury's query, which response resulted in this legal inconsistency, became, through all parties' acquiescence, the law of the case.[2]

Because of the agreement of the parties, the only judgment the trial court could have entered on the parents' property-damage claims that would have been *consistent with the jury's verdict* would have been a judgment for BIC. The judgment for the Beans on their property damage claim was clearly erroneous; the court should have entered a judgment for BIC on that claim. The judgment on that claim is reversed and a judgment is hereby rendered for BIC on that claim.

1930751 — AFFIRMED.

Shores, Kennedy and Ingram, JJ., concur.

Maddox and Houston, JJ., concur in the result.

1930853 — REVERSED AND JUDGMENT RENDERED.

Maddox, Shores, Houston, Kennedy and Ingram, JJ., concur.

MADDOX, Justice (concurring as to 1930853, but concurring in the result only as to 1930751)

I did not participate in this case on the original appeal, *Bean v. BIC Corp.*, 597 So.2d 1350 (Ala. 1992). Had I participated in that case, I would have affirmed Judge Stuart Leach's partial summary judgment in favor of BIC on the parents' claims alleging a design defect and a failure to warn, but a majority of this Court reversed that judgment. Judge Leach then presided over a jury

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[2] We understand, of course, that the wrongful death claim is statutorily vested in the parents without the necessity of an administration of the deceased minor's estate. We note this status of the parents simply to observe that no contention is made that that status, of itself, creates an inconsistency in the verdicts. Ala. Code 1975, § 6-5-391.

trial, which resulted in a jury verdict in favor of BIC on the parents' individual claims, but a verdict for the parents on their claims based on the children's injuries.

I conclude that the partial summary judgment granted initially was the correct judgment; but the law of this case, in my opinion, is that the plaintiffs had a legal right to present their claims to a jury, and they did so. Compare *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249 (Ala. 1987), in which I stated in a special concurrence that because the plaintiff had, in another proceeding, legally obtained the right to obtain a judgment against Black Belt, the plaintiff was entitled to receive any benefit of the law of that case.[3]

---

[3] In *Black Belt*, I said in my special concurrence:

> On the first appeal of this case, I was of the opinion that the trial court improperly ordered a new trial in the case as to Black Belt, and I authored the opinion which so held. On application for rehearing, however, the Court issued a new opinion, in which a majority of this Court held that the original opinion was in error, and opined as follows:
>
> "While the trial court's granting of a new trial, where the verdict is plainly and palpably supported by the evidence, is an abuse of its discretionary prerogative, we are obliged to indulge a presumption of correctness in favor of a new trial order where, as here, it is highly probable that the verdict under review is the result of confusion or misunderstanding or is inconsistent in law or in fact. *Cobb v. Malone*, 92 Ala. 630, 9 So. 738 (1891). Therefore, because we believe the trial judge properly perceived his discretionary role in preventing an unfair and unjust result under the circumstances, we affirm his order granting a new trial as to all three defendants."
>
> I dissenting from that on-rehearing opinion, stating that "I would deny rehearing because I am of the opinion that the law is correctly stated in the majority opinion as originally written." Joining me in my dissent were Justices Faulkner and Beatty. Nevertheless, plaintiff was given the right, at that time, by a majority of this Court, to try the case again before another jury. Because that

Based on the facts of this case, it is my opinion that BIC had no duty to manufacture a child-proof lighter and no duty to warn parents to keep its lighters out of the reach of their children. It appears that the jury was of the same opinion and therefore refused to award any damages on the parents' individual claims. I was almost persuaded to dissent as to the affirmance of the judgment against BIC based on the injuries to the children, because the jury verdicts appear to be inconsistent, but BIC made no objection after it was advised what the trial judge had done. Consequently, I must concur in the result as to the majority's affirmance in case number 1930751.

I concur as to the judgment in case number 1930853.

---

judgment was final, and plaintiff obtained the right to try the case again, I am of the opinion that the plaintiff legally obtained the right to obtain a judgment against Black Belt in another proceeding. Consequently, it is my opinion that plaintiff, having obtained a right to a new trial, is entitled to a review of the new trial without regard to my dissenting views on the first appeal, and that the judgment in this new trial must be based upon the principles of law as they exist today.

514 So.2d at 1256-57.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

November 3, 1995

1930751

BIC Corporation v. Samuel L. Bean III et al. (Jefferson: CV-89-3282)

1930853

Samuel L. Bean III and Leigh Ann Bean v. BIC Corporation.

(Jefferson: CV-89-3282)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

COOK, J. - Shores, Houston, Kennedy and Ingram, JJ., concur; Hooper, CJ., and Maddox, J., concur in result.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 3rd day of November, 1995

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX C

[EXHIBIT A]

AFFIDAVIT

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

Before me, the undersigned authority, in and for said state and county, personally appeared Stuart Leach, who, being by me first duly sworn, deposes and says as follows:

1. My name is Stuart Leach. I am the Presiding Judge of the Tenth Judicial Circuit of Alabama (Jefferson County). I have personal knowledge of the facts set forth herein.

2. I was the trial judge fore the trial of *Samuel L. Bean, III et al. v. BIC Corporation* (Civil Action No. CV 89-3292), which was tried in the Circuit Court for Jefferson County, Alabama, beginning on September 13, 1993. The trial concluded with a jury verdict on September 30, 1993.

3. On September 30, 1993, my law clerk, Ann Goodner, informed me that the jury had asked a question concerning whether the jury could award money to the children, Luke and Kristi Bean, but not to the parents, Sam and Leigh Ann Bean. At the time Ms. Goodner informed me of the jury's question, there were no attorneys for any party present. I instructed Ms. Goodner to tell the jury "yes."

4. After sending Ms. Goodner back to the jury room to answer affirmatively the question posed by the jury, I called the attorneys for the Beans and BIC Corporation into my chambers to advise them of what had transpired. There was no opportunity for the attorneys for either party to object to the Court's response to the jury's question before the response was delivered to the jury.

5. Shortly thereafter, the jury returned its verdict.

/s/ Stuart Leach
Stuart Leach
Affiant

Sworn to and subscribed
before me this 27th day
of July, 1994.

/s/ [illegible]
Notary Public

My commission expires: 3-13-96

[EXHIBIT B]

AFFIDAVIT

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

Before me, the undersigned authority, in and for said state and county, personally appeared Ann Goodner who, being by me first duly sworn, deposes and says as follows:

1. My name is Ann Goodner. I have firsthand knowledge of the facts hereinafter set forth. In 1993, and at all times relevant hereto, I served as a law clerk for the Honorable Stuart Leach, Presiding Judge of the Tenth Judicial Circuit of Alabama.

2. I served as law clerk for Judge Leach during the trial of the case of *Samuel L. Bean, III et al. v. BIC Corporation, et al.*, Civil Action No. CV 89-3292 in the Circuit Court for Jefferson County, Alabama. The trial began on September 13, 1993 and concluded with a jury verdict on September 30, 1993.

3. As the law clerk for Judge Leach, I was charged with the responsibility of coordinating the jury and making sure the jury's needs were taken care of on a daily basis. As with all jury trials, I was also responsible for making sure that the jury room door was closed during jury deliberations. I was also responsible for delivering any questions or messages that the jury had concerning the case directly to Judge Leach.

4. On September 30, 1993, during the jury deliberations in the *Bean v. BIC* case, one of the jury members asked the question whether they could award money to the children, Luke and Kristi Bean, but not to their parents, Sam and Leigh Ann Bean. The question was communicated to me verbally. I then went directly to Judge Leach's office to inform him of the question that the jury had posed. I informed Judge Leach of the question and he responded by telling me, "Yes." Judge Leach instructed me to return to the jury room to inform the jury of his response, which I did.

5. During my discussion with Judge Leach, the attorneys for the Beans and BIC Corporation were not present. To my knowledge, there was no discussion between Judge Leach and the attorneys regarding the question posed by the jury or the response to the question before I went to tell the jury of Judge Leach's response.

6. Shortly after I told the jury they could find for the children and not the parents, a juror knocked on the door indicating that they had a verdict. After the parties and attorneys were assembled in the courtroom, I escorted the jury to the jury box. At that time, the verdict was read.

7. To my knowledge, the question posed by the jury was not made known to the attorneys until after I left Judge Leach's office to deliver his response to the jury.

8. All of the information contained herein is to the best of my knowledge regarding the events which occurred during the jury deliberations in the *Bean v. BIC* trial.

/s/Ann Goodner
Ann Goodner

Sworn to and subscribed before me this 27th day of July, 1994.

/s/ [illegible]
Notary Public

My Commission Expires:
5/31/96